

LAW OFFICES  
LEVENTHAL, SENTER & LERMAN  
SUITE 600

2000 K STREET, N.W.  
WASHINGTON, D.C. 20006-1809

NORMAN P. LEVENTHAL  
MEREDITH S. SENTER, JR.  
STEVEN ALMAN LERMAN  
RAUL R. RODRIGUEZ  
DENNIS P. CORBETT  
BRIAN M. MADDEN  
BARBARA K. GARDNER  
STEPHEN D. BARUCH  
SALLY A. BUCKMAN  
NANCY L. WOLF  
DAVID S. KEIR  
DEBORAH R. COLEMAN  
J. BRECK BLALOCK  
NANCY A. ORY  
WALTER P. JACOB  
RENEE L. ROLAND\*

TELEPHONE  
(202) 429-8970

TELECOPIER  
(202) 293-7783

SENIOR COMMUNICATIONS  
CONSULTANT  
MORTON I. HAMBURG

March 27, 1995

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

\*ADMITTED MD ONLY

**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

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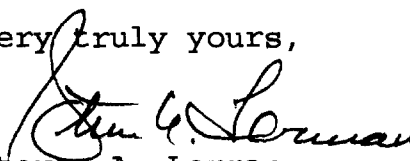
Re: CI Docket No. 95-6

Dear Mr. Caton:

On behalf of Infinity Broadcasting Corporation, we are transmitting herewith for filing an original and four copies of "Comments" in the above-referenced proceeding.

Should you have any questions, please contact the undersigned.

Very truly yours,

  
Steven A. Lerman

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Enclosures

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of  
the Commission's Forfeiture  
Policy Statement and  
Amendment of Section 1.80 of the  
Rules to Incorporate the Forfeiture  
Guidelines

)  
)  
) CI Docket No. 95-6  
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To: The Commission

**COMMENTS OF INFINITY BROADCASTING CORPORATION**

Infinity Broadcasting Corporation ("Infinity"),<sup>1/</sup> by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its comments on the Commission's Notice of Proposed Rulemaking, FCC 95-24, (released February 10, 1995) ("NPRM"). For the reasons stated below, Infinity requests the Commission to clarify that portion of the Commission's NPRM that relates to the treatment of "repeated or continuous" violations under the proposed adjustment criteria for Section 503 forfeitures.<sup>2/</sup>

I. **INTRODUCTION**

In the NPRM, the Commission seeks comments on its Policy Statement

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<sup>1/</sup> Infinity, through subsidiaries, is licensed to operate twenty-six radio stations located in major markets throughout the United States. Based upon both revenues and audience reached, it is the largest radio-only company in the United States, and was recently rated the "most admired" radio group in the industry by both station managers and Group CEO's.

<sup>2/</sup> See 47 U.S.C. § 503.

regarding standards for assessing forfeitures,<sup>3/</sup> and proposes to amend 47 C.F.R. § 1.80 to incorporate guidelines for assessing Section 503 and non-Section 503 forfeitures. See 47 U.S.C. § 503; NPRM at 1. The proposed rulemaking assigns base forfeiture amounts for Section 503 forfeitures with upward and downward adjustment criteria and incorporates statutorily prescribed amounts for non-Section 503 forfeitures which are then subject to mitigation or remission.<sup>4/</sup> NPRM at 11-12.

Infinity agrees with the Commission's general thesis that forfeiture guidelines will provide analogous treatment of similarly situated offenders and clearer guidance to the public regarding expected forfeitures. Infinity's focus in these comments relates solely to the Commission's application of the proposed upward adjustment for "repeated or continuous" violations in light of the limits that 47 U.S.C. § 504(c) imposes on future and pending forfeiture proceedings.

**II. THE COMMISSION SHOULD MAKE CLEAR THAT ANY FINAL RULE WILL INCORPORATE THE CONSTRAINTS EMBODIED IN SECTION 504(c).**

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<sup>3/</sup> Policy Statement Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993) ("Policy Statement"). The NPRM is an outgrowth of United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) ("USTA"), in which the United States Court of Appeals for the District of Columbia Circuit struck down the Policy Statement as having been promulgated in violation of the notice and comment procedures prescribed by 5 U.S.C. § 553 (b).

<sup>4/</sup> For example, 47 U.S.C. § 634 prescribes a \$500 per day forfeiture for cable EEO violations. As noted above, once assessed, this amount is then subject to mitigation or remission.

The NPRM contemplates an upward adjustment for "repeated or continuous" violations. NPRM at 11. The Commission proposes that this adjustment vary "up to the statutory maximum per violation or per day of a continuing violation." NPRM at n.5. The NPRM does not specifically state, however, that the upward adjustment will be applied in a manner consistent with the elementary due process principles codified in Section 504(c).

Section 504(c) of the Communications Act precludes the Commission from using unadjudicated forfeiture proceedings to the prejudice of a licensee in another proceeding. That provision states:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this chapter, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

47 U.S.C. § 504(c). Thus, the Commission may not consider an alleged, non-final forfeiture to the detriment of the licensee in any other Commission proceeding.<sup>5/</sup>

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<sup>5/</sup> See Pleasant Broadcasting Co. v. FCC, 564 F.2d 496, 500 (D.C. Cir. 1977) ("Section 504(c) prevents the existence of a notice of liability or an order of forfeiture from being used against a broadcast licensee in other Commission proceedings, unless the forfeiture has been paid or a court order requiring payment has become final") (citation to legislative history omitted); WYNN Radio, Inc., 59 F.C.C. 2d 424, 425 (1976) (denying a motion for stay of forfeiture proceedings, on grounds that the licensee has the right not to pay the forfeiture until ordered to do so by a United States District Court and, in the interim, Section 504(c) protects it by prohibiting the Commission from using the fact of issuance of the forfeiture notice against the licensee).

Section 504(c) is a due process codification and, unquestionably, a fundamental element of the Commission's forfeiture scheme. As such, Infinity believes that the Commission should not adopt a forfeiture policy that would assess penalties based upon repeated violations without specifying how Section 504(c) would be applied in that context. In particular, unless a prior forfeiture proceeding has been finally adjudicated, neither that prior proceeding nor the conduct underlying it may be included among alleged "repeated or continuous" violations and used to justify an upward adjustment. Rather, the Commission is obligated by its enabling statute to treat any prior unadjudicated violation as legally invisible. Accordingly, Infinity asks the Commission to clarify that any final rule will defer to the constraints embodied in Section 504(c) and will state, unequivocally, that neither prior unadjudicated violations nor the conduct underlying them will be considered in determining upward adjustments for "repeated or continuous" violations.

**III. THE COMMISSION'S INTERPRETATION OF SECTION 504(c) MUST COMPORT WITH THE LEGISLATIVE HISTORY OF THE PROVISION.**

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On its face, Section 504(c) precludes any Commission purported finding of, and reliance on, "patterns" of unadjudicated misconduct in the forfeiture context. As noted above, this statutory restriction precludes the Commission from applying an upward percentage adjustment for "repeated or continuous" violations on the basis of unadjudicated forfeitures. The

legislative history of the Communications Act demonstrates the propriety of this interpretation of Section 504(c).<sup>6/</sup>

Initially, when forfeiture authority was added to the Communications Act in 1960 to assist the Commission in eradicating rigged quiz shows and payola, Senate Commerce Committee Chairman John O. Pastore, architect of the legislation, remarked:

[In] regard to the forfeiture provisions, we felt we should include language which would guarantee due process. So . . . the licensee must be notified of the time when the violation was committed, and also must be notified of the nature of the violation; and after the fine is imposed, he has a right to go to the courts and begin the case de novo, on the merits.

106 Cong. Rec. 17622 (Aug. 25, 1960) (emphasis added).

With respect to Section 504(c) in particular, Senator Pastore inserted the following printed statement into the Congressional Record:

Also, in order to safeguard further the rights of the licensee, the bill as reported by this committee would further amend Section 504 . . . by adding thereto a new subsection designated as subsection (c).

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<sup>6/</sup> Infinity respectfully submits that the Commission has misinterpreted and misapplied Section 504(c) in past forfeiture proceedings. In a \$600,000 Notice of Apparent Liability ("NAL") directed to Infinity, for example, the Commission cited to prior unadjudicated misconduct "to exemplify the pattern of apparent misconduct warranting the fine we set today." Sagittarius Broadcasting Corporation, 8 FCC Rcd 2688, n.3.(1992). See also, Evergreen Media Corporation of Chicago, Priv. Ltr. Rul. FCC 93-97 (February 25, 1993) (stating that the licensee's increased forfeiture amount was based upon "repeated" indecency violations and a compliance history of "similar apparent misconduct"). Accordingly, the Commission's interpretation of Section 504(c) in the context of repeated or continuous violations is very important to all licensees and integral to the application of the Policy Statement in specific cases.

Such new subsection would provide that the pendency of a forfeiture action, prior to final adjudication thereof, as provided in the proposed amendment to Section 504(a) [regarding trial de novo in a federal district court], shall be without prejudice to the licensee in any other proceeding before the Commission.

When the representatives of the American Bar Association testified before the committee, fear was expressed that the Commission would take into account, in other proceedings before it in which a licensee was involved, the pendency of a forfeiture order which the Commission had issued against such licensee and prior to final adjudication of the licensee's liability.

106 Cong. Rec. 17623 (Aug. 25, 1960) (emphasis added); S. Rep. No. 1857, 86th Cong., 2d Sess. at 10-11 (1960) (containing identical language). Furthermore, the American Bar Association testimony to which the Senate Report refers included the following prescient observations:

Let's assume the Commission does not go to court to enforce the penalty. You nevertheless have standing on the record of that licensee a black mark. You have an order to pay a fine which that licensee has honestly and in good conscience refused to pay. The next time his licensee comes up for renewal or the next time he seeks to acquire another radio station or the next time he seeks to do anything else which requires the approval of the Commission, either the Commission or his opponents are in the position to come into the hearing and say look at the black mark against this man, he stands today in disobedience of an order of the Commission.

Testimony of Bryce Rea, Jr., Chairman, National Committee, American Bar Association Section of Administrative Law, Hearing on S. 1898 Before the Communications Subcommittee of the Senate Commerce Committee at 99 (Aug. 10, 1960). Senator Pastore was of a similar mind: "Now, I don't care how they do this, at what juncture they impose this fine so long as the licensee doesn't have to pay it until he has had his day in court and that he won't be penalized

for not having paid it. I mean, I brought that matter up." Id. at 98 (emphasis added). Indeed, toward the close of the hearing, the Senator requested Mr. Rea, another ABA representative who was present, the Commission's general counsel, and the NAB government affairs representative to meet with committee counsel to "draft something" to take care of this problem. Id. at 101-02.

In response, the ABA leaders suggested language that would prohibit any reliance on the issuance of a forfeiture or the pendency of a civil suit to enforce a forfeiture order, believed by them to be

indispensable if the Commission is to be empowered to issue orders of forfeiture without full hearing. We believe that under fundamental principles of due process licensees cannot be treated as guilty of violations of law by virtue of ex parte orders. The departure from due process would be particularly aggravated here since it would not be within the power of the licensee to seek to vindicate himself by instituting judicial proceedings and thereby securing a full hearing: i.e., a trial de novo. He would have to await suit against him to enforce the order, which might well be long delayed or, indeed, never brought.

Id. at 113 (reprinting letter of Bryce Rea, Jr. to Hon. John O. Pastore (Aug. 11, 1960)) (emphasis added).<sup>7/</sup>

The legislative history of 504(c) makes clear that the Commission may not use unadjudicated forfeiture proceedings to the detriment of a licensee in any other Commission

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<sup>7/</sup> The final Senate Report specified that the facts underlying a pending NAL could only be used where full procedural rights (e.g., cross examination) are afforded the licensee (S. Rep. No. 1857 at 1). Accordingly, as licensees are not afforded the right to cross examine or proffer evidence in the context of a non-final NAL, the facts or conduct underlying a mere forfeiture notice may not be used as a basis for increasing a forfeiture amount in another forfeiture proceeding.



proceeding. Accordingly, the Commission should include language reflecting the restrictions of Section 504(c) in its Policy Statement, particularly in light of the fact that the Commission has misapplied Section 504(c) in the past (see note 6, supra). Infinity submits that, without such clarifying language, the Commission's proposal to apply an upward adjustment for "repeated or continuous" violations leaves open the possibility of precisely what the cited legislative history indicates is barred: use of the mere existence of an unresolved forfeiture proceeding or the conduct underlying it to the prejudice of the licensee in another proceeding. Thus, the Commission should clarify that, consistent with the plain language as well as the legislative history of Section 504(c), upward adjustments cannot and will not be based upon prior unadjudicated forfeitures.

**IV. PENDING FORFEITURE PROCEEDINGS SHOULD BE ADDRESSED  
ON AN AD HOC BASIS AND EVALUATED ACCORDING TO  
SIMILAR OFFENSES**

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In the NPRM, the Commission proposes to apply the Policy Statement and guidelines prospectively. With regard to pending proceedings, in which proposed forfeitures were effectively vacated by the USTA case, the Commission proposes to reset each forfeiture on a case-by-case basis. Infinity agrees with this approach.

Since the USTA decision, the Commission has been resetting forfeitures on an ad hoc basis, based upon analogous case law precedent. NPRM at 3. Infinity agrees with the Commission's tentative conclusion that the agency may not simply apply the Policy Statement retroactively, as such an approach would effectively negate the USTA Court's action by reinstating the forfeiture schedule struck down by that Court. Accordingly, the Commission

must apply the new Policy Statement and guidelines prospectively from their effective date. However, with regard to pending forfeitures and consistent with Section 504(c), the Commission is obligated to set forfeiture amounts based strictly upon an evaluation of analogous circumstances and not upon prior alleged, non-final violations or the conduct underlying them.<sup>8/</sup>

V. CONCLUSION

For the foregoing reasons, Infinity urges the Commission to clarify that upward adjustments for "repeated or continuous" violations will incorporate the constraints imposed by

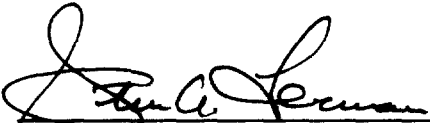
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<sup>8/</sup> For example, prior to the issuance of the Policy Statement, the Commission evaluated indecency violations under the authority of 47 U.S.C. § 503(b)(E) and in light of relevant precedent. Section 503(b)(E) provides that the forfeiture amount for broadcasting indecent material shall not exceed \$1,000 per day. Accordingly, in assessing any monetary penalty for pending forfeitures, the Commission should rely on this statutorily prescribed forfeiture amount and an evaluation of other similarly situated offenders, but without regard to other non-final forfeiture proceedings involving the same licensee.

Section 504(c). In light of that interpretation, the Commission should evaluate each pending forfeiture proceeding based upon proceedings of similarly situated offenders.

Respectfully submitted,

INFINITY BROADCASTING CORPORATION

By: 

Steven A. Lerman

Dennis P. Corbett

Renee L. Roland

Leventhal, Senter & Lerman  
Suite 600  
2000 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-8970

March 27, 1995

Its Attorneys